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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 448

DAVID T. WILENTZ, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; J. H. THAYER MARTIN, STATE TAX COMMISSIONER OF THE STATE OF NEW JERSEY, AND WALTER R. DARBY, COMMISSIONER OF MUNICIPAL ACCOUNTS OF THE STATE OF NEW JERSEY, AS AND CONSTITUTING THE MUNICIPAL FINANCE COMMISSION OF THE STATE OF NEW JERSEY; EARL KIRCHER, CONRAD WEBER AND WILLIAM G. HIRSCH, MEMBERS OF THE BOARD OF ASSESSORS OF THE BOROUGH OF RUNNEMEDE, NEW JERSEY, AND ALBERT W. SPENCER, TAX COLLECTOR OF THE BOROUGH OF RUNNEMEDE, NEW JERSEY,

Appellants,

vs.

SOVEREIGN CAMP, WOODMEN OF THE WORLD,

Respondent.

STATEMENT UNDER RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

(Filed August 29, 1938.)

I. Basis of Jurisdiction of the Supreme Court of the United States.

The basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal

to review the decree in question is that said appeal is from a final decree of a specially-constituted three-judge United States District Court, convened pursuant to Section 266 of the Judicial Code of the United States. There is drawn in question in this suit the validity of a statute of the State of New Jersey on the ground of its being repugnant to the Constitution of the United States, and the enforcement and execution of said statute by an administrative commission of the State of New Jersey, viz., the Municipal Finance Commission of the State of New Jersey. The said final decree is a decision against the validity of the said statute and of its enforcement and execution by the said Municipal Finance Commission.

II. Statutory Provisions Sustaining Jurisdiction.

The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States are Section 266 of the Judicial Code of the United States, being Chapter 231, Section 266, of the Act of March 3, 1911 (36 Stat. 1162), as amended by Chapter 160 of the Act of March 4, 1913 (37 Stat. 1013), as amended by Chapter 229, Section 1, of the Act of February 13, 1925 (43 Stat. 938), and Section 238(3) of the Judicial Code of the United States, being Subsection 3 of Section 1 of Chapter 229 of the Act of February 13, 1925 (43 Stat. 938), entitled "Section 238".

III. Statute of the State of New Jersey, the Validity of Which is Involved.

The statute of the State of New Jersey, the validity of sections of which is involved, is "An Act Concerning Municipal Finances", being Chapter 340 of the Pamphlet Laws of 1931 of the State of New Jersey, as from time to time amended and supplemented. Said statute, as amended and supplemented, may be found in the official edition of "The

Revised Statutes of New Jersey (1937)", being Title 52, Chapter 27, Sections 1 to 66, both inclusive (52:27-1 through 66); Title 52, Chapter 24, Section 19.1 (52:24-19.1); Title 52, Chapter 14, Section 32 (52:14-32); and Title 1, Chapter 1, Section 10 (1:1-10). The pertinent portions of said statute, being those the validity of which was assailed by the complaint below and held void in the opinion, findings of fact and conclusions of law, and final decree, are here set out verbatim as follows:

"Whenever the commission shall function in any municipality and so long as it shall continue so to do, no judgment, decree, levy or execution against the municipality or the property thereof for the recovery of the amount due on any bonds, notes or other obligations of the municipality, in the payment of which the municipality has defaulted, shall be enforced until otherwise specially ordered by the supreme court or a justice thereof in an appropriate proceeding for such purpose, after notice to the commission, and the enforcement of any such judgment, decree, levy or execution shall be stayed until otherwise specially ordered as aforesaid." (Revised Statutes of New Jersey (1937) 52:27-32.1.)

"Whenever the commission shall function in any municipality and so long as it shall continue so to do, no action or proceeding of any kind, either direct or ancillary, by way of mandamus or otherwise, shall be brought against such municipality or any public officers for the assessment, levy or collection of taxes by or for such municipality and any and all actions or proceedings therefor shall be and they hereby are stayed; except that first, the supreme court or a justice thereof, after notice to the commission, may authorize one or more creditors of such municipality to bring and maintain an action or proceeding therefor in the supreme court, which shall be brought for the benefit of themselves and all other creditors of such municipality and in which all other creditors of such municipality shall have the right to intervene and assert their claim and

in which all other creditors of such municipality may, and the commission shall, be made parties in such manner and upon such notice as the supreme court shall approve; and except that, second, the commission may bring and maintain an action or actions by way of mandamus or by any other appropriate proceeding or proceedings for the assessment, levy or collection of taxes by such municipality for the payment of principal or interest of the indebtedness of the municipality found to be outstanding as provided in section 52:27-14 of this title.

"Without limiting its power otherwise to direct by mandamus the assessment, levy or collection of taxes, the supreme court in any such proceeding may, to the extent which it shall deem just and equitable, afford to the holders collectively of any due and unpaid claims against a municipality any remedy which might be afforded under any other law to any individual creditor in any mandamus proceeding for the assessment, levy or collection of taxes, to the same extent as if there had been an entry of judgment in their favor, issuance of execution and return thereof unsatisfied, service thereof upon public officials and performance of any and all other conditions precedent to the affording of such relief by mandamus under such other law; provided, that the court be first satisfied from proof submitted by affidavit or otherwise that the claims for the enforcement of which such remedy is sought are claims upon which a judgment could be obtained." (Revised Statutes of New Jersey (1937) 52:27-33.)

"Whenever the commission shall function in any municipality and so long as it shall continue to do so, no action or proceeding at law or in equity shall be brought or prosecuted, the purpose of which is to affect the disposition of property or funds owned or controlled by the municipality, except as provided in this chapter.

"If any such municipality has in its possession or under its control, or there is in the possession or under the control of the commission, any property or funds of such municipality which are or may be available for the payment of interest or principal upon any of the debts of such municipality (over and above the payment of

the current operating expenses of the municipality and the maintenance of a reasonable working capital), then such municipality in its discretion may apply, or if directed by the commission shall apply, to the supreme court to determine the application and distribution of such property or funds to and among the creditors of the municipality, and in any such case the supreme court in its discretion may permit an application for relief of the same character to be made by any creditor of the municipality. In any such proceeding all creditors of the municipality shall be made parties thereto in such manner and upon such notice by publication or otherwise as the supreme court shall approve, and any creditor may appear therein and assert his rights to receive all or any part of such property or funds.

"In case any such proceeding shall be instituted, the supreme court may direct the municipality to make no payments from any of such moneys so available until the determination of the proceeding or until permitted by the supreme court. Unless and until such a direction shall be made, payments may be made by such municipality on account of principal and interest as the municipality may determine and as may be approved by the commission." (Revised Statutes of New Jersey (1937) 52:27-33.2.)

"Whenever the commission shall function in a municipality having a school district coterminous therewith which is governed by the provisions of chapter 7 of the title Education (§ 18:7-1, *et seq.*):

a. No judgment, decree, levy or execution against such school district or the property thereof for the recovery of the amount due on any bonds, notes or other obligations of the school district, in the payment of which such school district has defaulted shall be enforced until otherwise specially ordered by the supreme court or a justice thereof in an appropriate proceeding for such purpose, after notice to the commission, and the enforcement of any such judgment, decree, levy or execution shall be and it hereby is stayed until otherwise specially ordered as aforesaid;

b. No action or proceeding of any kind either direct or ancillary, by way of mandamus or otherwise, shall be brought against such school district, municipality, or any public officers for the assessment, levy or collection of taxes for such school district and any and all actions or proceedings therefor shall be and they hereby are stayed; except that first, the supreme court or a justice thereof, after notice to the commission may authorize one or more creditors of such school district to bring and maintain an action or proceeding therefor in the supreme court, which shall be brought for the benefit of themselves and all other creditors of such school district and in which all other creditors of such school district shall have the right to intervene and assert their claim and in which all other creditors of such school district may, and such commission shall, be made parties in such manner and upon such notice as the supreme court shall approve; and except that, second, the commission may bring and maintain an action or actions by way of mandamus or by any other appropriate proceeding or proceedings for the assessment, levy or collection of taxes for such school district for the payment of principal or interest of the indebtedness of the school district found to be outstanding as provided in section 52:27-46 of this title; without limiting its power otherwise to direct by mandamus the assessment, levy or collection of taxes, the supreme court in any such proceeding may, to the extent which it shall deem just and equitable afford to the holders collectively of any due and unpaid claims against a school district any remedy which might be afforded under any other law to any individual creditor in any mandamus proceeding for the assessment, levy or collection of taxes, to the same extent as if there had been an entry of judgment in their favor, issuance of execution and return thereof unsatisfied, service thereof upon public officials and performance of any and all other conditions precedent to the affording of such relief by mandamus under such other law; provided, that the court be first satisfied from proof submitted by affidavit or otherwise that the claims for the enforcement of which such remedy is

sought are claims upon which a judgment could be obtained;

c. No action or proceeding at law or in equity shall be brought or prosecuted, the purpose of which is to affect the disposition of property or funds owned or controlled by the school district, except as herein provided; if any such school district has in its possession or under its control, or there is in the possession or under the control of the commission, any property or funds of such school district which are or may be available for the payment of interest or principal upon any of the debts of such school district (over and above the payment of the current operating expenses of the school district and the maintenance of a reasonable working capital), then such school district in its discretion may apply, or if directed by the commission shall apply, to the supreme court to determine the application and distribution of such property or funds to and among the creditors of the school district, and in any such case the supreme court in its discretion may permit an application for relief of the same character to be made by any creditor of the school district; in any such proceeding all creditors of the school district shall be made parties thereto in such manner and upon such notice by publication or otherwise as the supreme court shall approve, and any creditor may appear therein and assert his rights to receive all or any part of such property or funds; in case any such proceeding shall be instituted, the supreme court may direct the municipality to make no payments from any of such moneys so available until the determination of the proceeding or until permitted by the supreme court; unless and until such a direction shall be made, payments may be made by such municipality on account of principal and interest as the municipality may determine and as may be approved by the municipal finance commission;

d. Upon the application of any creditor made upon notice to the school district and the commission, the supreme court may vacate, modify or restrict any statutory stay contained in this statute." (Revised Statutes of New Jersey (1937) 52:27-62.)

"The governing body of any municipality in which the commission is functioning may compromise and adjust the whole or any part of any special assessments or taxes delinquent to the municipality, but nothing in this section shall be construed to impair or affect in any way the existing rights and remedies of any holder of a certificate of tax sale, representing any tax title or titles to lands in such municipality sold on account of delinquent taxes or delinquent assessments, or both.

"No claims of the municipality for taxes or assessments, and interest thereon, in excess of five hundred dollars, shall be compromised without the assent in writing of the commission.

"All moneys received by the municipality by compromise or adjustment of taxes or special assessments shall, if the commision so provide, be paid only to the account of the reserve fund referred to in section 52:27-25 of this title." (Revised Statutes of New Jersey (1937) 52:27-26.)

Your petitioners would like to call the attention of this Honorable Court to the provisions of a section of the said Act not cited below by complainants or the court.

"Upon the application of any creditor made upon notice to the municipality and the commission, the supreme court may vacate, modify or restrict any statutory stay contained in this article." (Revised Statutes of New Jersey (1937) 52:27-33.3.)

Nor was the provision for relaxation of stays in school districts (52:27-62d, *supra*) cited below by complainants or court.

IV. Date of Final Decree and Date of Application for Appeal.

The final decree sought to be reversed was entered on June 6, 1938. The application for appeal is presented on August 29, 1938.

V. Nature of the Case and of the Rulings of the Specially Constituted United States District Court.

The Borough of Runnemede, a municipality of the State of New Jersey, having within it a school district coterminous with it, in 1934 was forced by the pressure of economic circumstances to default in payment of interest upon and principal of its bonded debt. Pursuant to the provisions of the New Jersey "Act Concerning Municipal Finances", the Borough in 1934 applied to the Supreme Court of New Jersey for an order adjudging it unable to meet its obligations, and ordering the Municipal Finance Commission of the State of New Jersey to function within it. The order was made and granted, upon hearing, by Justice Lloyd of the New Jersey Supreme Court.

When a municipality in New Jersey is subject to the jurisdiction of the Municipal Finance Commission, the statutes of New Jersey provide that such jurisdiction shall be deemed to cover also coterminous school districts. The acts provide in substance for stays of creditors' remedies when municipalities and school districts are subject to the jurisdiction of the Municipal Finance Commission. These stays provide for a creditors' action for the benefit of all creditors, and that the stay may be relaxed or modified upon application by any creditor.

The complainant in the case below was owner and holder of a final judgment, obtained in the United States District Court for the District of New Jersey, against the Board of Education of the Borough of Runnemede, based upon municipal bonds dated June 1, 1930.

In June, 1936, the complainant brought this suit. The complaint contained four counts. In Counts 1, 3 and 4 all of the defendants were made parties. In Count 2, only the Municipal Finance Commission was made a party. After alleging the above matters in substance, Count 1 alleged

that a demand had been made for the payment of the judgment, execution issued and returned *nulla bona* and a certified copy thereof served upon the assessors of the taxing districts in which the school district is located, and that such assessors had failed in the duty enjoined upon them by law to assess a tax to meet such execution, basing their refusal upon the stays made effective by the Act Concerning Municipal Finances when the Municipal Finance Commission has been given jurisdiction over the taxing district. It then alleged that the Act Concerning Municipal Finances containing such stays was enacted after the issuance of the bonds represented by plaintiff's judgment and that such stays have been held valid by the Court of Errors and Appeals of the State of New Jersey in the case of *Hourigan* v. *Township of North Bergen*, 113 N. J. Law 143, 172 Atl. 193, concurring opinion 172 Atl. 785 (N. J. Err. and App. 1934). It alleged the stays to be unconstitutional as applied to plaintiff's bonds. The count then charged that the Municipal Finance Commission had certified to the Borough Council of the Borough of Runnemede a budget which contained no provision for the levy and collection of a special tax to meet plaintiff's judgment, and had approved a budget for the Board of Education which contained no such provision, and that the municipal officers would adopt and put into force budgets which would not include such provision. It alleged that the Municipal Finance Commission had no affirmative power to levy taxes, had failed and neglected to exercise diligently the limited powers granted to it in the interests of holders of the bonds of the borough and school district, had been lax and dilatory, and had encouraged the borough and school district to disregard the demands for payment of any amounts to bondholders.

The count alleged that plaintiff had filed a petition for a writ of mandamus, in the United States District Court for

the District of New Jersey, to compel the assessment of taxes for the payment of its judgment, and that proofs had been taken on said petition but charged that the matter would not be decided for some time.

It then alleged that if the Borough Council and Board of Education of the borough should adopt and put into force and effect budgets which made no provision for plaintiff's judgment prior to a final determination of the application for a writ of mandamus, the plaintiff would suffer irreparable injury and damage. The count closes with the allegation that plaintiff had no remedy at law.

The prayer for relief was that the Municipal Finance Commission be enjoined from functioning in the school district; that the court adjudge the stay provisions of the Act Concerning Municipal Finances unconstitutional and void; that the local Board of Assessors and Tax Collector be enjoined from assessing taxes for 1936 without including the amount of plaintiff's judgment, and that the court declare that the plaintiff's rights to compel a tax levy were governed solely by the New Jersey Executions Act.

Count 2 substantially re-alleged the allegations of Count 1, and added that plaintiff owned additional bonds of the same issue as those on which the judgment was based, that as a result of the stay provisions of the Act Concerning Municipal Finances, a cloud of unenforceability had been cast upon these bonds, and that the school district and board of education would make no payments thereon as principal and interest might become due, so that the plaintiff would be forced to bring a multiplicity of suits. In the prayer of Count 2 only the Municipal Finance Commission was made defendant.

Count 3 substantially re-alleged the allegations of Count 1, and so much of Count 2 as alleged the ownership of bonds in addition to those on which the judgment was based. It

added the statement that plaintiff's judgment and bonds were payable in lawful money of the United States only, that at the time of the issuance of the bonds it was the law of the State of New Jersey that taxes should be paid in lawful money only, and that, pursuant to the Act Concerning Municipal Finances, the governing body of a municipality over which the Municipal Finance Commission has jurisdiction was empowered to compromise taxes provided that no claim for more than $500 shall be compromised without the consent of the Commission. It further alleged that in two instances the Municipal Finance Commission had consented to such compromises with respect to the Borough of Runnemede. Plaintiff alleged that it owned no property in the Borough of Runnemede, and that the compromise was illegal because it gave a preference to the holders of bonds accepted in payment of taxes.

The prayer for relief was that the Municipal Finance Commission be enjoined from assenting to such compromises, that the tax collector be enjoined from consummating the same, and that the court declare unconstitutional the provisions of the Act Concerning Municipal Finances authorizing such compromises.

Count 4 substantially re-alleged the allegations of Count 1, and the allegations of Count 2 with respect to the ownership of bonds in addition to those upon which the plaintiff's judgment is based, and added that an actual controversy existed between plaintiff and defendant, the Municipal Finance Commission, as to the constitutionality of the stay provisions.

It repeated the prayers for relief against the functioning of the Commission in the municipality and for a declaration as to the unconstitutionality of the stay provisions, and added a prayer for an injunction against the enforcement and execution of the statutes by the Municipal Finance Commission.

The Commission's answer to Count I admitted the description of the parties, the nature of the claim and the amount, Runnemede's general default and the inception of the Commission's functioning in the borough and school district. It admitted the existence of the Act, as passed after the bonds were issued (but pointed out that the law permitted a creditor to ask that any stay be vacated, modified or restricted). It admitted recovery of the judgment, and that payment had been asked, but not that execution had been served on the assessors and collector. It admitted that no special levy was included in the borough budget, but alleged that the borough had no such duty, that the school budget had been adopted before bringing the suit, tax bills made out and paid, and that to direct a levy would result in utter confusion.

Making the same disposition of repeated allegations, the Commission admitted as to Count II that plaintiff held bonds not reduced to judgment. As to Count III, it admitted that plaintiff's bonds and judgment were payable in lawful money of the United States, and that when the bonds were issued New Jersey law provided that taxes should be so paid, but alleged that at that time the compromise of taxes due was permitted by law. It admitted that the Commission had, some time before, approved acceptance of bonds for taxes, but pointed out that this practice was discontinued some six months before the bill was filed, save for two transactions actually then pending, and that the resolution for discontinuance made this a permanent policy of the Commission. Other matters were denied.

By way of separate defenses in point of law arising upon the face of the bill, the Commission alleged, *inter alia*, that no cause for equitable relief was made out, that the remedy at law was adequate. It further alleged that the court was without jurisdiction to issue an injunction, under Section 266 of the Judicial Code, because the suit was not brought

to restrain the operation of a State statute, or the actions or orders of State officers or a board or commission in enforcing it. It alleged that the statutory court was without jurisdiction to issue an injunction against the *local* officials to restrain their collecting taxes without making provision for plaintiff's judgment. It alleged that the court was without jurisdiction of the bill of complaint because the complaint was in fact a suit against a State, within the ban of the 11th Amendment of the Federal Constitution, and that any injunction, if issued, would exceed the powers of the court by interfering with the internal and local government and affairs of the State of New Jersey, in derogation of the 10th Amendment of the Federal Constitution.

The answer of the local officials was virtually the same. They also alleged that the particular remedies, if any, attached to plaintiff's bonds, had been lost by merger of any cause of action on the bonds in the judgment, that the judgment had been recovered after passage of the Act, and that consequently no impairment of contract within the Federal Constitution could be claimed to exist.

The contention of the defendants that the statutory court below was completely without jurisdiction of the suit, since the State officers and the enforcement of a State statute by them was at most only colourably involved, is thus the primary question for determination. Over and above that, however, the contention of the defendants was that even the single-judge district court to which the case must be remitted would not be called upon to issue an injunction or declaratory judgment. The principal issues in the suit became: (a) the alleged unconstitutionality of the Act Concerning Municipal Finances; (b) the alleged unconstitutionality of the acceptance by the borough of bonds in payment of taxes; (c) the seeking of a determination that the plaintiff's right as judgment creditor were governed by the old New Jersey Executions Act rather than the Tax Act of 1918.

After adjournment from time to time on terms, without the granting of an interlocutory injunction, the matter came on for hearing October 29, 1936. Evidence was taken; that for plaintiff was directed solely to its claim that the value of its bonds not reduced to judgment had been lessened by the mere existence of the Act. On March 21, 1938, Judge Avis filed for the Court an opinion which is adequately summed up in the findings of fact and conclusions of law. The opinion is reported at 23 Federal Supplement 23, and is attached.

The findings were that the municipality was in default and that the Municipal Finance Commission, pursuant to an order of the Supreme Court of New Jersey, was functioning in it and its school district; that plaintiff had taken judgment on its bonds in default; that no taxes had been levied to pay the judgment, because of the pending mandamus; "that one reason for said failure and omission was because the Municipal Finance Commission was functioning in the municipality". It was also found that there was no sufficient evidence of a cloud of unenforceability, or great depreciation of the bonds because of the Act.

The court below concluded on Count I that it had jurisdiction; that the Municipal Finance Commission was a necessary party to all counts; that the defense of merger was unavailing; that the stay provisions were unconstitutional "in so far as they affect the right of the complainant to enforce its judgment obtained in and entered in this Court"; that the Execution Act and School Law, rather than the Tax Act of 1918, controlled the plaintiff's remedy; and that it would not enjoin the borough from collecting taxes without providing for plaintiff's judgment. The court concluded under Count III to enjoin defendants from making settlement for taxes "by any medium except in accordance with the laws of New Jersey". As to Count IV it found an

"actual controversy" and granted relief applicable when judgment should be obtained on bonds not yet sued on.

The final decree specifically embodied these findings and conclusions, enjoined the defendant Commission from functioning in the municipality "to the extent that such functioning may be inconsistent with the right of the complainant to enforce its execution in the manner herein stated". It held the Acts unconstitutional "in so far as they affect the right of the complainant to enforce its judgment", but denied an injunction against levying taxes not including the judgment. It decreed that the Execution Act applied. The decree restrained the defendants from "making settlement for taxes by any medium except in accordance with the laws of the State of New Jersey". Finally it decreed the stay provisions unconstitutional in so far as they might affect future recovery on other bonds.

VI. Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

Cases holding that the complaint does not state a case for a three-judge court, but should be remitted:

(a) As to Counts 1, 2 and 4 of the complaint:

In Counts 1, 2 and 4 of the complaint both the Commission and the local taxing officers were made parties defendant. The act sought to be enjoined is the "functioning" of the Commission within the municipality.

Where a three-judge district court convenes upon a case in which it has no jurisdiction, it is bound to remit it to a single district judge for trial. This is particularly true where, as here, no interlocutory injunction is insisted upon or granted.

Smith v. *Wilson*, 273 U. S. 388, at 391 (1927);

Film Transport Co. v. *Mich. Publ. Utility Comm.*, 17 F. (2d) 957 (U. S. D. C., E. D. Mich., 1927);

Hi-Ball Transit Co. v. *Railroad Comm. of Texas*, 27 F. (2d) 425 (U. S. D. C., N. D. Tex., 1928).

Section 266 of the Judicial Code provides that an interlocutory injunction may be issued to restrain the enforcement of a State statute and the officers enforcing it, when unconstitutionality is the ground alleged, only when heard before a three-judge court. The requirement as to the presence of three judges applies to the final hearing as well. The plaintiff in such a suit, then, must be barred from its usual forum because it seeks (a) an interlocutory injunction (b) against the enforcement of a State statute (c) which will control officers (d) on the ground of unconstitutionality.

Plaintiff's basic claim of unconstitutionality is the stay provisions of the Act Concerning Municipal Finances. These stay provisions provide that as long as the Commission functions in a municipality execution is stayed unless otherwise ordered by the State Supreme Court; that mandamus is stayed except that the State Supreme Court may authorize a creditors' action in mandamus for the benefit of all creditors, or that the Commission may bring such an action; and that a proceeding may be brought for distribution of tax collections on hand in reserves, in which case the State Supreme Court may order that no disbursement be made pending determination of the application. The law also provides that any creditor may apply to the Supreme Court to relax any of these stays. It is the plaintiff's claim that the stays impair the obligation entered into by the municipality when it sold the bonds at a time prior to the enactment of the law in question.

The only State officers involved are the Municipal Finance Commission. They do not enforce the stay, or order it into being. If they are enjoined from enforcing the stays, the injunction is useless, for they cannot relax them.

There is no virtue in the argument that an injunction is asked against the Commission's *functioning* in the municipality rather than its enforcing the stays. The stay lasts as long as the appointment of the Commission for the

municipality continues unrevoked, and if a hypothetical injunction were issued barring the Commission from performing any act in the municipality, the stay would nonetheless continue. It is completely divorced from positive acts of the Commission.

If the plaintiff were right in its contention that an injunction against the Commission's functioning in the municipality would result in the stay *ipso facto* falling, that would still give no basis for an injunction. All the acts of the Commission in the municipality are included in its functioning under the plaintiff's argument. But may the Commission be stayed from its many undisputedly constitutional activities simply to destroy the stay which the Commission itself does not enforce or bring into being?

The very decree below illustrates the truth of petitioners' argument. It enjoins the "Municipal Finance Commission from functioning in the Borough of Runnemede, New Jersey, to the extent that such functioning may be inconsistent with the right of the complainant to enforce its execution in the manner herein stated, but without prejudice to any of the powers or duties of the Municipal Finance Commission under the Municipal Finance Commission Act except as the stays therein contained affect the right of the complainant to enforce its judgment". No specific act of enforcement of a State statute by State officers (the Commission) is named. Yet that is the *sine qua non* of jurisdiction of a three-judge court under Judicial Code, Section 266.

(b) As to Count 3 of the complaint:

Count 3 of the complaint, directed against the approval by the Commission of acceptance of bonds in settlement of taxes where the deal in question involves more than $500 is the only count directly involving a positive act by the Commission.

The Commission ceased the practice, save for a few minor prior commitments, in October, 1935, 6 months before the complaint was filed.

Any action which the Municipal Finance Commission could take would be wholly secondary—a matter of approving by an "assent in writing" a settlement made by local officials. The sole reason for joining the Commission in this count is to gain a colourable joinder in order to seek a three-judge district court. This is even more obvious when we see that the plaintiff did not join as a defendant the body which makes such settlements, the Borough Council.

It is settled that a mere nominal joinder of State-officials as defendants in a case where the substantial relief really sought is an injunction against local officials does not require the convening of a three-judge court.

Pleasant v. *Missouri-Kansas-Texas Ry.*, 66 F. (2d) 842, at 843-44 (C. C. A. 10th, 1933), cert. den. 291 U. S. 659 (1934).

An exact parallel is demonstrated in the cases arising on colourable joinder of parties to secure State or Federal jurisdiction through their citizenship. In such cases the colourable joinder of unnecessary parties is again rejected as insufficient.

Rogers v. *Penobscot Mining Co.*, 154 Fed. 606, at 610 (C. C. A. 8th, 1907), and cases there cited.

Salem Trust Co. v. *Manufacturers' Finance Co.*, 262 U. S. 182, at 190 (1924).

If plaintiff's demand for relief on this issue were in good faith, it would seek an injunction in district court against the tax collector, who *accepts* such payment of taxes, or against the local governing body, which under the Act Concerning Municipal Finances itself is the only body which *makes* them. If plaintiff's contention as to such compro-

mises is correct, an injunction against the responsible parties in a one-judge district court would serve its every purpose far more efficiently than the present colourable joinder.

Cases holding that a single-judge district court would not have to consider the constitutionality of the stays:

The plaintiff's case is based upon a demand for an injunction and a demand for a declaratory judgment. As has been pointed out, an injunction against the Commission does not lie because the Commission does not enforce or relax the stays.

A declaratory judgment against the Commission cannot be issued for the same reason. The Commission did not assert against the plaintiff that the stays were constitutional, nor did it enforce them against plaintiff. The Federal Declaratory Judgment Act extends only to cases of *actual controversy.* Judicial Code, Section 274d. The Supreme Court has recently pointed out that there must, to support a declaratory judgment, be "action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining."

Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288, at 325 (1936);

Electric Bond Co. v. *Comm.*, 303 U. S. 419, at 443 (1938);

Banning v. *Marsh*, 124 Nebr. 207, 245 N. W. 775, at 776 (1932);

Axton v. *Goodman*, 205 Ky. 382, 265 S. W. 806, at 807 (1924).

The same disassociation from the power to enforce the stays which prevents an injunction against the Commission bars a declaratory judgment—the declaratory judgment

does not attempt to change the essential requisites for the exercise of judicial power. The fundamental difficulty is that the Commission has nothing to do with the enforcement of the stays.

Nor can an injunction issue against the local officers to prevent them, under Count I, from collecting any taxes without including plaintiff's judgment therein. There is an adequate legal remedy—mandamus, of which the plaintiff, indeed, had availed itself. Ancillary mandamus is, under settled law, the only way to enforce the judgment if a levy of taxes is sought and a bill in equity does not lie:

Walkley v. *City of Muscatine*, 6 Wall. 481, at 482 (1867);
Rees v. *City of Watertown*, 19 Wall. 107, at 124 (1873);
Thompson v. *Allen County*, 115 U. S. 550 (1885).

Since the remedy by mandamus is adequate, a declaratory judgment against the local officials does not lie. While some small conflict of authority exists in cases where the legal remedy is not adequate, there is no opportunity for the declaratory judgment where the legal remedy is plain and enough.

Automotive Equipment, Inc., v. *Trico Products Corp.*, 11 Fed. Supp. 292 (U. S. D. C., W. D. N. Y., 1935);
Zenie Bros. v. *Miskend*, 10 Fed. Supp. 779, at 782 (D. C., S. D. N. Y., 1935).

If this should result in the plaintiff being denied mandamus in the discretion of the court, as in *United States ex rel. Christmas* v. *Asbury Park*, 78 F. (2d) 1003 (C. C. A. 3rd 1935), it would merely go to show that the plaintiff had no interest in the controversy sufficient to justify the granting of a declaratory judgment, as intimated in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 (1936).

Cases holding that the stays are discretionary and constitutional:

Your petitioners do not believe there is any need to consider the constitutionality of the stays, since they feel that plaintiff has failed to make out a case upon its pleadings for the exercise of either injunction or declaratory judgment. The following cases will serve to illustrate, however, that the stays are discretionary and constitutional.

The right of mandamus which plaintiff may have possessed was at all times subject to the rule that mandamus is a discretionary remedy, to be exercised only in the sound discretion of the court. This has always been the rule in the Federal courts, most recently announced with precise application to the New Jersey statute here under consideration:

United States ex rel. Christmas v. *Asbury Park*, 78 F. (2d) 1003 (C. C. A. 3rd 1935), cert. den. 296 U. S. 624 (1935).

The Circuit Court of Appeals there said that mandamus was to be granted by the court only in the exercise of a sound discretion. That is the precise wording and intent of the statute here involved. The State law is in accord with the Federal law. No argument can be made, of course, that the statutory stay is to be applied by the Federal court without power to relax it, in contradistinction to the discretionary stay power already existing there. Naturally no State statute is drawn in an attempt to confer upon or take from a Federal court its power to issue writs.

The stay provisions have been set out above. All of them are effective only "until otherwise specially ordered by the Supreme Court or a justice thereof in an appropriate proceeding for such purpose". In addition, any creditor may apply to the Supreme Court to vacate, modify or restrict any stay.

In the New Jersey courts as well the remedy of mandamus is a discretionary one. The Act was considered on constitutional grounds four years ago by the highest court of New Jersey, and held valid.

Hourigan v. *North Bergen Township*, 113 N. J. Law 143, 172 Atl. 193, concurring opinion 172 Atl. 785 (N. J. Err. and App. 1934).

The aversion of the New Jersey courts to permitting a single creditor a preference over all other creditors in a race of diligence to secure the funds of an insolvent municipality was well-illustrated in:

Vanderpoel v. *Borough of Mt. Ephraim*, 111 N. J. Law 423, at 424, 168 Atl. 575 (N. J. Err. and App. 1933).

The only stays in the Act complained of are stays discretionary with the State court. The Federal court has the same discretion, irrespective of the Act, as the State court. The fact that the State court has this discretion to relax them does not render them unconstitutional. If they were otherwise bad, it would save them. The Supreme Court has ruled that the second Frazier-Lemke Act, since it had such a provision, complied with the requirements of due process:

Wright v. *Vinton Branch Bank*, 300 U. S. 440, at 460-81 (1937).

Cases holding that plaintiff is not entitled to injunction or declaratory judgment against the acceptance of bonds for taxes:

There is no dispute between the parties that the plaintiff attacks acceptance of bonds for tax payments, rather than tax compromises generally. October 11, 1935, six months before the complaint was filed, the Commission resolved to make no further bond tax settlements save those then

pending. It has been stipulated by the parties that this had been adhered to. For that reason neither injunction nor declaratory judgment can issue, for there is no real threat to plaintiff:

Morrison v. *Fall*, 290 Fed. 306 (App. D. C., 1923), affirmed *sub. nom. Morrison* v. *Work*, 266 U. S. 481 (1925);

Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288, at 325 (1936);

Electric Bond Co. v. *Comm.*, 303 U. S. 419, at 443 (1938).

Plaintiff conceivably might see fit to claim that the possibility that the Commission might assent to a bond compromise at some time in the future constitutes some sort of a threat. Equity, however, may not be invoked against an inoperative statute because of its mere existence, particularly with the procedure here attempted:

Sperry-Hutchinson Co. v. *Kuhn*, 212 Fed. 555, at 557 (U. S. D. C., E. D. Mich., 1912).

The *Ashwander* case demonstrates that the declaratory judgment does not allow actions supported solely on supposition.

Passing that point, can there be doubt that the conceded power of the municipality to "compromise taxes" includes power to do so by accepting bonds? Unfairness and preference to one set of bondholders could justify setting such action aside on constitutional grounds. No proof was offered of such unfairness, nor was any attempt made to show the power was not or could not be exercised fairly and constitutionally. The admitted benefits of such action are great, for property is thus kept on the tax roll, the municipality's interest burden is lessened, and remaining bond-

holders have an increased ratio of basic security to the debt they hold. No tax liens are extinguished, and the Commission allowed only previous year's taxes so to be extinguished, requiring full payment in cash for the current year.

When the bonds were issued the municipality could compromise taxes where they exceeded the value of the Property, *i. e.*, were in fact uncollectible.

Pamphlet Laws of 1928 of New Jersey, Chapter 123, Section 1, at page 250.

There is no proof in the instant case that the Commission ever allowed settlements where the taxes were otherwise collectible.

Cases holding that plaintiff's rights on its bonds are governed by the Tax Act of 1918 rather than the Executions Act:

The New Jersey courts have never had occasion to rule on this question. Plaintiff claims that it is entitled to levy execution under Section 35 of the Executions Act and Section 237 of the School Law. These sections (here denominated the Executions Act) governed executions against school districts:

Pamphlet Laws of 1881 of New Jersey, Chapter 77, Section 1, page 80;

Pamphlet Laws of 1903 of New Jersey (2nd Sp. Sess.), Chapter 1, Section 237, page 93.

Defendants contend that in 1930, when plaintiff's bonds were issued, these had been superseded by the Tax Law of 1918.

Pamphlet Laws of 1918 of New Jersey, Chapter 236, Section 505, page 865, second sentence.

The Tax Act of 1918 governs executions against "taxing districts". There can be no doubt that a school district in New Jersey is a taxing district.

Pamphlet Laws of 1918 of New Jersey, Chapter 236, Section 101, page 847;

Pamphlet Laws of 1910 of New Jersey, Chapter 242, Section 1, page 399.

Since the inhabitants of a school district have the power to "raise * * * a special district tax", a school district is a taxing district.

The Executions Act required the execution against a school district to be lodged with the assessors of the taxing district. The Tax Act of 1918 requires it to be lodged with the County Board of Taxation. The two provisions simply cannot exist side by side—if they do, then a judgment creditor can have two executions, two mandamuses, and two taxes.

Cases holding that plaintiff's procedural rights on its bonds were lost by merger of its rights on its original obligation in its judgment:

When a cause of action is reduced to judgment, the judgment merges both the original cause of action and the evidence of the debt.

Schuler v. *Israel*, 120 U. S. 506, at 509 (1887);

Barnes v. *Drake*, 31 N. J. Law 317 (N. J. Supr. 1865);

Friedland v. *Isquith*, 106 N. J. Eq. 349, 150 Atl. 840 (N. J. Ch. 1930).

Cases holding that appeal is the proper remedy:

Matthews v. *Rodgers*, 248 U. S. 521 (1932);
Stratton v. *St. Louis S. W. Ry. Co.*, 284 U. S. 530 (1932).

Dated August 29, 1938.

DAVID T. WILENTZ, J. H. THAYER MARTIN and WALTER R. DARBY, as and Constituting the Municipal Finance Commission of the State of New Jersey; EARL KIRCHER, CONRAD WEBER and WILLIAM G. HIRSCH, Members of the Board of Assessors of the Borough of Runnemede, New Jersey; and ALBERT W. SPENCER, Tax Collector of the Borough of Runnemede, New Jersey,

Appellants,

WILLIAM A. STEVENS,
Solicitor for Appellants David T. Wilentz, J. H. Thayer Martin and Walter R. Darby, as and Constituting the Municipal Finance Commission of the State of New Jersey;

S. LEWIS DAVIS,
Solicitor for Appellants Earl Kircher, Conrad Weber and William G. Hirsch, Members of the Board of Assessors of the Borough of Runnemede, New Jersey, and Albert W. Spencer, Tax Collector of the Borough of Runnemede, New Jersey.

EXHIBIT "A".

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

In Equity. E-5515.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, *Complainant*,

vs.

DAVID T. WILENTZ, Attorney General of the State of New Jersey; J. H. THAYER MARTIN, State Tax Commissioner of the State of New Jersey, and WALTER R. DARBY, Commissioner of Municipal Accounts of the State of New Jersey, as and Constituting the Municipal Finance Commission of the State of New Jersey; EARL KIRCHER, CONRAD WEBER and WILLIAM G. HIRSCH, Members of the Board of Assessors of the Borough of Runnemede, New Jersey, and ALBERT W. SPENCER, Tax Collector of the Borough of Runnemede, New Jersey, *Defendants*.

ON BILL FOR INJUNCTION, ETC.

(Filed March 21, 1938.)

Arthur T. Vanderbilt, for Complainant.

William A. Stevens, for Municipal Finance Commission.

E. J. Dimock, B. L. Visscher and Arnold Frye, of Counsel.

Joseph Varbalow, for Members of Board of Assessors and Tax Collector of the Borough of Runnemede.

Harry Grossman, of Counsel.

Before Davis, Circuit Judge, and Avis and Forman, District Judges.

AVIS, *District Judge:*

The bill of complaint in this cause contains four counts: the first, in general, alleging that the School District of Runnemede, New Jersey, is coterminous with the Borough of Runnemede, a municipal corporation of the State of

New Jersey, and that complainant is the owner and holder of a final judgment, in the amount of $21,776.21, entered in this court on December 5, 1935, against the Board of Education of said Borough on certain bonds then matured, and overdue coupons, held by said complainant and unpaid; that execution was issued on said judgment, served by the United States Marshal on the officers of said Borough as required by law, and returned *nulla bona* on January 5, 1936; that the officers of said Borough have failed and neglected to provide for the payment of said judgment in accordance with the statutes of the State of New Jersey and to make an assessment upon the persons and property in said Borough to raise the money to satisfy said judgment and execution.

The first count of said bill further alleges that a mandamus proceeding is pending in this court, which is undetermined.

It is alleged that the failure and refusal of the officers of said Borough to make said assessment and levy is based upon the fact that said School District is and has been under the control of the Municipal Finance Commission of the State of New Jersey, under the statutes of said State; and in accordance with the provisions of said statutes no judgment, levy or execution against such School District, or property thereof shall be enforced until otherwise specially ordered by the Supreme Court of the State of New Jersey, or a Justice thereof, after notice to the Commission, &c.

It is further alleged that the statute authorizing the said Commission was passed and approved after the issue of the bonds and coupons, the basis of the judgment so held by the complainant.

The prayers of this count are:

(a) That subpœna issue.

(b) That defendant Municipal Finance Commission be restrained from functioning in said School District.

(c) That said Commission be temporarily restrained.

(d) That this court adjudge and declare Chapter 330, Laws of 1933, and Chapters 195 and 258, Laws of 1935,

as amended and supplemented, unconstitutional and void insofar as they attempt to affect the enforceability of complainant's bonds and judgment by staying proceedings for the enforcement thereof.

(e) That the assessing and collecting officers of said Borough be restrained from assessing, levying or collecting any taxes in said Borough for the year 1936, without including the amount due on complainant's judgment.

(f) That it be adjudged and declared that complainant's right to collect is governed solely by Section 35 of the Execution Act and Section 237 of the School Laws of New Jersey, as cited in the bill of complaint.

(g) Other and further relief as may be equitable and just.

The second count embodies all of the allegations of fact and law contained in the first count; alleges that it owns bonds of the School District of Runnemede, dated June 1, 1930, numbered 9 to 78, inclusive, in the amount of $1,000 each, with the interest coupons attached, the principal of said bonds accruing serially, and that by reason of the enactment of the statutes relating to the Municipal Finance Commission, which attempt to restrain the enforcement of any obligations of a municipality under the supervision of said Commission, a cloud of unenforceability has been publicly cast upon complainant's bonds, and that by reason thereof complainant has been and will continue to be irreparably damaged.

The prayers in this count are:

(a) For subpœna.

(b) That the cloud be removed by restraint against defendants Wilentz, Martin and Darby, constituting the Municipal Finance Commission, and the Commission restrained from functioning in said School District.

(c) That temporary or interlocutory injunction and restraint issue.

(d) That the statutes creating the Municipal Finance Commission be declared unconstitutional and void as to complainant's bonds.

(e) That complainant's rights to compel a levy and collection of taxes is governed solely by the Execution Act and School Laws of the State of New Jersey.

(f) For other and further relief as may be equitable and just.

The third count realleges the facts and law as contained in the first count, and further alleges that the Commission has approved resolutions of the Borough providing for compromise of certain taxes and assessments due said Borough by accepting bonds in payment thereof. Alleges that such action gives a preference; that the security of complainant's bonds is thereby impaired, all of which is in violation of the United States Constitution, to wit, Article I, Section 10.

The prayers are:

(a) For subpœna.

(b) That the Municipal Finance Commission be restrained from assenting to such compromises.

(c) That said Commission be restrained from authorizing or assenting to the acceptance of any medium other than lawful money in payment of taxes.

(d) That the tax collector of the Borough be restrained from receiving payment of taxes, except from payment of full amount, interest and penalties.

(e) That said collector be restrained from accepting any medium in payment of taxes other than lawful money.

(f) That this court decree that Section 6 of Chapter 330, Laws of 1933, as amended and supplemented, to be unconstitutional and void as to complainant's judgment and bonds, as being contrary to Article I, Section 10 of the United States Constitution.

(g) For other and further relief.

Count four realleges and reaffirms the facts and law alleged in the first count and in paragraph 2 of the second count, and is in the nature of an action for a declaratory decree as to the right of the complainant to make collection

on its bonds and coupons because of the unconstitutionality of the stays contained in the Municipal Finance Commission Acts of the State of New Jersey.

Its prayers are:

(a) For subpœna.

(b) That this court hold, adjudge and declare that, as to the School District bonds issued prior to their enactment, the Municipal Finance Commission Acts of the State of New Jersey are unconstitutional and void, contrary to Article I, Section 10 of the United States Constitution.

(c) That the Commission be enjoined in the enforcement and execution of said statutes.

(d) That this court restrain the Commission and its members from functioning in the School District of the Borough of Runnemede.

(e) For other and further relief.

The matter came before the Court originally on June 23, 1936, when it appeared that the validity of a State statute was challenged, requiring the convening of a Three Judge Court. Arrangements were made to convene such a court, and on the aforesaid date an order to show cause was issued, returnable on July 9, 1936, at Trenton.

On that date, after a hearing, it was agreed in open court that the defendants would not accept or approve the acceptance, until the further order of the court, of bonds of the Borough or School District of Runnemede in payment of current or delinquent taxes, and further that counsel would prepare for final hearing on or before September 15, 1936. Upon this agreement, no preliminary injunction was issued, and decision on all questions was postponed until final hearing.

Answer for all defendants was filed on August 1, 1936, and final hearing took place on October 29, 1936. On this date a stipulation of certain facts, signed by counsel for the respective parties, was filed, and some witnesses produced who gave their testimony.

Argument has been heard and briefs submitted.

From the testimony taken, and the stipulation filed, we find as facts:

(1) That the Borough of Runnemede is a municipal corporation of the State of New Jersey.

(2) That the Board of Education of the Borough of Runnemede is coterminous with the Borough of Runnemede.

(3) That on or about June 1, 1930 the Board of Education of the Borough of Runnemede issued and sold $78,000 school bonds, dated June 1, 1930, numbered 1 to 78, inclusive, of the denomination of $1000 each, and bearing interest at the rate of five and one-quarter per cent per annum, payable semi-annually on the first days of June and December of each year; that complainant purchased all of said bonds; that the bonds were serial bonds, maturing in numerical order, $2000 on June first in each year 1932 to 1937, inclusive, and $3000 on June first in each year 1938 to 1959, inclusive; that on June 1, 1932, Numbers 1 and 2 of said bonds were paid; that the bonds thereafter maturing have not been paid, and that the interest on the remaining bonds, which became due on June 1, 1932, or at any subsequent date, has not been paid.

(4) That upon May 15, 1934, after a summary investigation, and upon application of the Borough of Runnemede Frank T. Lloyd, Justice of the Supreme Court of the State of New Jersey, made and entered an order, in which it was determined that the Borough was unable to meet its obligations, and the Municipal Finance Commission was authorized and instructed to function in said Borough with all the powers and duties conferred by the statute.

(5) That thereupon the said Commission commenced to function in said Borough, and has since that time so functioned with relation thereto, as well as with relation to the said Board of Education.

(6) That judgment on the overdue bonds, and the delinquent interest represented by the coupons upon which default had been made, was entered in this court in a suit brought by complainant on December 5, 1935 for the sum of $21,776.21.

(7) That execution was issued thereon, on December 24, 1935, directed to the Marshal of the District of New Jersey, which execution was in the usual form, and was returned by the said Marshal as served upon Gardner S. Driver, Secretary of the Camden County Board of Taxation, Albert W. Spencer, Tax Collector of the Borough of Runnemede, and William G. Hirsch, Tax Assessor for said Borough.

(8) That Arthur T. Vanderbilt, counsel for complainant, on January 3, 1936, addressed a letter to Conwood (Conrad) Weber, Secretary, Board of Tax Assessments of said Borough, reciting the serving of the execution, and inquiring as to whether the Board of Assessors would assess and levy the amount due on the execution, and that no reply thereto was ever received.

(9) That the said Arthur T. Vanderbilt, counsel as aforesaid, also wrote and despatched a letter to the Secretary of the Camden County Board of Taxation, requesting information as to whether the said Board of Taxation would add the amount due upon the execution to the amount certified by the taxing officials of said Borough, pursuant to Section 505 of P. L. 1918, Chapter 236. To this letter said Secretary replied, advising that the matter would be referred to his Board, and that said Board would probably refer the matter to the county solicitor. The county solicitor, on or about February 24, 1936, by letter, advised counsel for complainant that the Camden County Board of Taxation would not so add the amount, until the determination of the mandamus proceedings then pending.

(10) That the Board of Assessors failed and omitted to add the amount of said judgment to the moneys to be raised for the year 1936, and that one reason for said failure and omission was because the Municipal Finance Commission was functioning in the municipality, and that said assessors made no change in the rate as fixed by the county tax board; that the county tax board made no change to include the amount due on the execution because it had been advised by special counsel of the Municipal Finance Commission that litigation was then pending in the United States District Court for the District of New Jersey as to the necessity of adding said additional amount.

(11) Although the evidence produced by complainant relating to the effect of the legislation claimed to be unconstitutional upon the value of municipal securities, is undisputed, it is not sufficient to establish the fact claimed by complainant that said legislation had publicly cast a cloud of unenforceability, or that by reason thereof the market value of complainant's bonds has been greatly depreciated.

Conclusions of law:

We are satisfied that, under the provisions of Section 266 of the Judicial Code (28 U. S. C. A. sec. 380), the issues raised in the pleadings in this cause have been legally presented to a Three-Judge Court, and that this Court, as constituted, has jurisdiction to dispose of the question of preliminary injunction, as well as the determination of the issues presented by the pleadings. All matters involved were, by stipulation and order, continued to final hearing, upon the agreement of defendants not to accept or approve acceptance of bonds in payment of current or delinquent taxes until the further order of the Court.

We hold that the members of the Municipal Finance Commission are proper, necessary and indispensable parties to the action because of the supervisory control which the act of the Legislature of the State of New Jersey gives them over the municipality in question; that as such members they are given authority to enforce the provisions of the act, and that such authority invests them with powers making it necessary that they should be party defendants for the enforcement of any decree that may be made in this action. This conclusion applies to all of the counts in the bill of complaint.

We also determine that the rights of the complainant are not impaired or changed by reason of the fact that the judgment on bonds and coupons has been entered in this court, but that its rights are to be determined by the law in effect at the time the bonds were issued and the contract made.

We have examined the proofs and considered the argument and briefs submitted as to the relief prayed for in count one, and have concluded, without citing the many authorities presented on behalf of all parties, that the com-

plainant is entitled to a decree adjudging and declaring Chapter 330, Laws of New Jersey 1933, and Chapters 195 and 258, Laws of New Jersey 1935, as amended and supplemented, to be unconstitutional and void insofar as they affect the right of the complainant to enforce its judgment obtained and entered in this court, and that such enforcement shall be in accordance with the laws existing in the State of New Jersey at the time of the issuance and sale of the bonds in question, and the laws applicable are Section 35 of the Execution Act (2 Comp. Stats. p. 2256) and Section 237 of the School Law (4 Comp. Stats. 4804). The provisions of the Tax Act of 1918 did not, by implication, repeal the above mentioned laws, upon which the complainant relies. Such repeals are not favored, and the provisions of the various statutes are not materially inconsistent.

The defendants, members of the Municipal Finance Commission, will be restrained from functioning in the Borough of Runnemede, to the extent that such functioning may be inconsistent with the right of the complainant to enforce its execution in the manner herein stated.

The prayer to enjoin and restrain the Assessors of said Borough from assessing and levying the taxes, and the Collector from collecting the same, without including therein the amount of complainant's judgment is denied, as beyond the power of this Court, as well as unnecessary in view of the relief granted on other prayers.

We are not construing the provisions of the Municipal Finance Commission Acts of the State of New Jersey, its constitutionality or its effect, except as the stays therein contained affect the right of the complainant to enforce its judgment.

As to count two, we have determined as a fact that the complainant has not produced sufficient evidence to satisfy the Court that it should use the extraordinary remedy of injunction to restrain the members of the Municipal Finance Commission from functioning in the Borough of Runnemede, and the conclusions as to count one of the complaint give ample and sufficient protection for the collection of the balance of the bonds owned by complainant.

The necessity for an injunction under count three appears to be moot, if the Commission adheres to its present policy. However, it is apparent that settlement of taxes by the acceptance of bonds may materially interfere with the complainant in the collection of its judgment, and restraint will be granted enjoining the defendants from making settlement for taxes by any medium except in accordance with the laws of the State of New Jersey.

Count four is based upon, and asks for relief under, the Declaratory Judgment Act (28 U. S. C. A. sec. 400). An examination of the cases indicates that the complainant has an "actual controversy", under the provisions of that act, and is entitled to a decree of similar character to that granted herein with relation to count one, applicable to the remainder of complainant's bonds, if and when judgment may be entered thereon, or any portion thereof, in this court and execution issued.

Decree will be made in accordance with this opinion.

(8252)